

**Before the
DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
Washington, D.C. 20230**

In the Matter of)
The Continued Transition of the)
Technical Coordination and Management) Docket No. 071023616-7617-01
of the Internet Domain Name and)
Addressing System: Mid-Term Review of the)
Joint Project Agreement)
Notice of Inquiry)

COMMENTS OF NETWORK SOLUTIONS, LLC

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February 15, 2008

I. Introduction

Network Solutions submits these comments in response to the National Telecommunications and Information Administration's ("NTIA") November 2, 2007 Notice of Inquiry on the midterm review of the Joint Project Agreement ("JPA") and the continued transition of the technical coordination and management of the Internet's Domain Name System ("DNS"). Network Solutions commends the U.S. Department of Commerce ("Department") and the NTIA for their leadership in this complex arrangement. We are committed to preserving and enhancing the private-sector-led, bottom-up consensus policy development model that has made ICANN successful. We also applaud ICANN for its efforts and the progress it has made in addressing the requirements of the Joint Project Agreement ("JPA").

At this point in time, however, we believe that it is premature to state that ICANN has already met the requirements of Annex A of the JPA, which are necessary for a successful autonomous existence. ICANN must achieve these changes to demonstrate that it can maintain long-term sustainability through effective self-governance. Specifically, ICANN should adopt the following additional accountability, transparency and competition measures as a precondition for termination of the JPA:

- Adopting additional ICANN Board decision-making procedures;
- Changing the ICANN Bylaws to provide sufficient ICANN Board oversight;
- Improving the ICANN budgeting process and financial disclosures;
- Mandating public review of material contracts; and
- Improving competition by introducing new Top Level Domains ("TLDs") and Internationalized Domain Names ("IDNs").

We look forward to working with ICANN over the next 18 months to help address these issues. At the same time, we also look forward to working with ICANN and the NTIA to develop a post-JPA transition plan. It is important that both of these efforts be conducted contemporaneously, but a transition plan should not be finalized until the preconditions for ICANN satisfying the JPA are met.

II. Meeting the Requirements of the JPA should be a Precondition to Termination

It would be premature to terminate the JPA before ICANN achieves certain responsibilities to which it committed in Annex A of the JPA. Specifically, ICANN committed to improving transparency and accountability measures, as well as increasing competition in the domain name marketplace. While ICANN has made some progress in these areas, particularly in terms of transparency, ICANN still has work to do to achieve its laudable goals of becoming a truly accountable and transparent organization and furthering competition in the domain name marketplace. Until the following issues are addressed, the JPA should remain in effect.

A. ICANN’s Accountability and Transparency Measures Still Require Improvement

1. *The ICANN Board’s Decision Making Needs to be More Accountable and Transparent*

ICANN should adopt internal measures to ensure that its Board members are accountable for their actions and decisions and that there are sufficient oversight mechanisms to address important Board decisions. Under its Bylaws, ICANN is required to be “accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”¹ In the JPA, ICANN committed to “improve[ing] on accountability mechanisms to be responsive to global Internet stakeholders”² The Internet community and vested stakeholders should have confidence that the Board is acting in the best interest of DNS security and stability.

Stakeholders should be able to understand fully a Board decision and to formally dispute it through meaningful mechanisms. Considering the magnitude and importance of a Board decision, the current mechanisms for understanding the rationale behind a decision, and for appeal, do not foster the level of accountability appropriate for ICANN. The Board should be subject to a high standard to protect its integrity and to encourage confidence in its decisions. The organization must protect itself from the possibility of eight voting Board members—out of fifteen—acting inconsistently with ICANN’s mission, ideals, goals, and the will of the community.

To bolster accountability, transparency, and the community’s trust, ICANN should adopt procedures that promote unquestionable validity of the Board’s decisions. Board decisions should be based on methodical decision-making processes subject to meaningful community review. This type of approach would promote a sense of due process and fairness in Board actions. The ICANN Board should comply with basic decision-making procedures and measures, which include providing an analytical component of decisions. ICANN should explain how stakeholders, staff, and experts’ comments were taken into consideration and how and why such inputs were or were not followed in a final decision. By utilizing mechanisms that are more accountable and transparent, a predictable system, which generates consistent results, could be realized. This approach could result in growing community confidence in ICANN’s decisions, and should be adopted prior to the termination of the JPA.

2. *The Mechanisms to Review ICANN Board Decisions Must Be Amended and Strengthened*

Currently, there is a lack of sufficient oversight and checks on the Board. The current mechanisms of reviewing an ICANN Board decision also are insufficient. Currently, an affected person now may challenge a board decision through any of the

¹ Bylaws for Internet Corporation for Assigned Names and Numbers, Article I, Sections 2, 10.

² JPA, Annex A, no. 3.

following three alternative mechanisms: (1) Reconsideration Committee, (2) Independent Review Panel (“IRP”), or (3) the Ombudsman. None of these three options offer the Internet community the appropriate level of recourse to hold the Board accountable for its decisions.

First, a stakeholder seeking review through the Reconsideration Committee must have its challenge heard by a subset of the same group that made the original decision. The Reconsideration Committee process is simply an opportunity for the Board to affirm its own decision. Reconsideration Committee review is limited only matters that involve a violation of ICANN policies or a decision made without consideration of material information.³ While reconsideration might be a helpful process when important information was not considered by the Board, it is not an effective accountability measure.

The second mechanism to challenge a Board decision is through the IRP. Under an IRP action, a person who is materially affected by an ICANN act or decision may seek an outside third-party review only if it is shown that a Board decision was inconsistent with ICANN’s Articles of Incorporation or Bylaws. If a challenge survives this hurdle, the IRP can only issue a non-binding recommendation to the very same Board that made the challenged decision in the first place. While the review might be independent, the decision-making power to act on the review is not. Therefore, this method suffers from the same impartiality defect as a review by the Reconsideration Committee.

The third mechanism for challenging a decision is to request review through the ICANN Ombudsman, who also is not empowered to order any change. Not unlike the Reconsideration Committee and the IRP, the Ombudsman merely provides advice to the same Board that acted in the first place.

Some options that have been discussed to address this lack of sufficient oversight over the ICANN Board include: adding additional requirements for super majority voting, providing for the potential to veto a Board decision, and amending the mechanisms to remove a Board member. In order to meet the terms of the JPA, ICANN must amend its Bylaws to create new procedures for challenging a Board decision. We look forward to working with ICANN in achieving the level of Board accountability necessary for the organization to be transitioned from the JPA requirements.

3. *ICANN’s Financial Accountability and Transparency Measures Need Improvement*

ICANN’s 2008-2009 budget is proposed at \$61 million.⁴ Between 1999 and 2008, ICANN’s revenue has risen from \$5.9 million to \$52 million.⁵ Since fiscal year 2005-2006, ICANN’s budget has nearly quadrupled. These vastly expanded resources

³ Bylaws, Article IV, Section 2.2, available at <http://www.icann.org/general/bylaws.htm#IV>.

⁴ See Initial Operating Plan and Budget Framework for Fiscal Year 2009 (February 4, 2008), available at <http://www.icann.org/planning/ops-budget-framework-09.pdf>.

⁵ See ICANN Financial Information, available at <http://www.icann.org/general/financial.html>.

require adequate changes in oversight and accountability to ensure that the funds are used in furthering ICANN's mission.

ICANN should adopt regular reporting standards and additional budget-setting processes to achieve its JPA commitment to "improve processes and procedures to encourage improved transparency...related to...funding for ICANN operations."⁶ By applying a framework and benchmarks, ICANN could promote confidence that the available resources will be used in a manner that promotes its core mission.

Currently, there are no reporting standards or transparent budget-tracking systems in place. The Finance Committee, in consultation with the President, *may* establish such standards and benchmarks.⁷ Such standards and benchmarks, however, are not required; we believe that they should be mandatory.

An illustration of this lack of sufficient reporting is the .net Registry Agreement. Section 7.2 of that agreement provides ICANN with a \$0.75 USD per name per year fee for each .net domain name registered. Per the terms of the agreement, ICANN is required to apply the collected fees to: (1) a special restricted fund to support participation in ICANN by developing countries, (2) a special restricted fund to enhance and facilitate security and stability of DNS, and (3) "general operating funds to support ICANN's mission to ensure the stable and secure operation of the DNS."⁸ While we are confident that ICANN has spent these resources in an appropriate fashion, ICANN has not published whether, when, and how these funds were allocated. This type of reporting is necessary in a transparent and accountable organization.

The ICANN budget process also should involve relevant stakeholders at more meaningful levels. We believe that by including stakeholders on an expanded Finance Committee or Budget Advisory Committee, ICANN would promote community input in a more significant manner. By including more stakeholders, ICANN could permit the community to directly impact budgeting issues.

ICANN's commitment to performing independent external audits and publishing an annual report are a welcome step to improving transparency. We believe, however, that additional measures are still necessary to improve the financial accountability and transparency of ICANN. ICANN should adopt specific standards and benchmarks to be used in developing a budget. We also believe that key stakeholder groups should be more directly involved in determining the budget. These efforts should be accomplished prior to the termination of the JPA.

⁶ JPA, Annex A, no 2.

⁷ See ICANN Accountability & Transparency Framework and Principles, at 14, January 2008, available at <http://www.icann.org/transparency/acct-trans-frameworks-principles-10jan08.pdf> (last visited January 23, 2008); see also Finance Committee of the Board, Art. III(3), available at <http://www.icann.org/committees/finance/> adopting Resolution 00.96, Preliminary Report, Special Meeting of the Board (December 18, 2000), available at <http://www.icann.org/minutes/prelim-report-13dec00.htm#00.96/>.

⁸ See .net Registry Agreement, Section 7.2(a) Fees to be Paid to ICANN.

4. ICANN Should Amend its Bylaws to Require Community Review of Important Contracts

ICANN's contract approval methods lack a consistent review process. For example, important changes to the .net Registry Agreement were never published for public comment prior to ICANN executing the agreement. Since then ICANN has published most important contracts for review, but it has never amended its Bylaws to make it clear that all material contracts **must** be published for public review and comment. Without requiring the consideration of stakeholder comments in contract formation, ICANN does not honor its commitment to transparency and the bottom-up, multi-stakeholder approach.

ICANN should modify its Bylaws to clearly require that all material contracts be published for review by stakeholders. The Board must demonstrate through transparent mechanisms that the comments on draft agreements were considered and set forth the reason why the information was or was not used or followed prior to execution of the agreement. This approach will honor ICANN's obligation to the Internet community and provide legitimacy to Board decisions related to contract formation. This change should occur prior to the termination of the JPA.

B. ICANN Needs to Enhance Competition in the Domain Name Marketplace

ICANN needs to continue its progress toward developing competition in the domain name marketplace. One of ICANN's core values is to succeed in "introducing and promoting competition in the registration of domain names...."⁹ Through the JPA, ICANN made a commitment to "maintain and build on processes to ensure that competition . . . issues are identified and considered in TLD management decisions, including the consideration and implementation of new TLDs and the introduction of IDNs."¹⁰ While ICANN has introduced competition among registrars, with over 900 currently accredited, the registry space has not been equally addressed.

By introducing new TLDs and IDNs, ICANN will encourage competition in the registry space, which in turn should drive innovation, promote lower costs and prices, and enhance user choice and satisfaction. Introducing competition in the domain name marketplace is integral to the Internet's future. Failure to do so fails an important market demand and increases the likelihood that some countries and/or language groups will set up their own infrastructure – thereby "splitting the root" and undermining the premise of a universal Internet. We appreciate that the introduction of new TLDs and IDNs is a complex issue, and we are committed to assisting in this process. ICANN must deliver on its plan to meet this JPA requirement as a precondition to the termination of the JPA.

⁹ Bylaws, Article I, Section 2(6), available at <http://www.icann.org/general/bylaws.htm#IV>.

¹⁰ JPA, Annex A, no. 5.

III. Simultaneous Commitment to Achieving JPA Requirements and Developing a Transition Plan

While we believe that it is premature to terminate the JPA, we do support the model of private sector transition. At the same time that the ICANN community addresses the remaining issues in the JPA that require completion, ICANN, the Department, and the Internet community should work together to develop a transition plan to determine what ICANN would look like after the termination of the JPA.

As a transition plan is developed, we believe that it is critical to consider commitments that ICANN should make to itself and the Internet community to be honored after the termination of the JPA. At a minimum, ICANN should make a commitment to retain its status as a California corporation. ICANN has stated that one reason it is an accountable organization is that “the State of California provides a rigorous framework of legal accountabilities for organizations of this type.”¹¹ Therefore, ICANN should be committed to remain subject to California law and the state-imposed fiduciary obligations to ensure that the Board maintains its current requirements of a duty of care, duty of inquiry, duty of loyalty, and duty of prudent investment.

IV. Conclusion

In the next 18 months, ICANN should work to address the specific issues that we have raised in order to achieve transition from the JPA. ICANN should adopt additional decision-making procedures, Board oversight measures, financial disclosures, and public review of contract requirements all to enhance its transparency and accountability. Moreover, ICANN must succeed in enhancing the competitive marketplace by successfully introducing new TLDs and IDNs.

Network Solutions is committed to a full transition of the technical coordination and management of DNS, and we should work together during the same time frame to establish a transition plan. We believe, however, that the Department should continue to monitor ICANN’s efforts to ensure that it fulfills its transparency, accountability, and competition obligations prior to any transition.

¹¹ ICANN Accountability & Transparency Framework and Principles, at 16, January 2008, available at <http://www.icann.org/transparency/acct-trans-frameworks-principles-10jan08.pdf> (last visited January 23, 2008).